

Caution and the Constitution: Should There Be An Article V Convention for Proposing Amendments?

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Summary

Introduction:

When asked whether another convention should be convened to consider adding a bill of rights to the newly drafted Constitution, James Madison, the Father of the Constitution, replied, “Having witnessed the difficulties and dangers experienced by the first convention which assembled under every propitious circumstance, I should tremble for the result of a second.”

Fast forward some 234 years and we find a well-funded, sophisticated campaign lobbying state legislatures to petition Congress to call an Article V convention for proposing amendments to the Constitution. These campaigns rely upon some modern legal scholarship that assures state legislatures that an Article V convention would only produce their preferred policy outcomes.

The basic arguments of the advocates ignore Madison’s prescient warnings about the dangers of another convention and stress the following points:

1. An Article V convention is a “convention of the states” with well-known and well-understood procedural rules and processes that will keep the convention on track.
2. An Article V convention can be limited in topic and scope
3. An Article V convention can be controlled by the states
4. An Article V convention is subject to judicial review
5. An Article V convention is not dangerous because it takes 38 states to ratify any proposed amendment.

Analysis of Advocates’ Main Arguments for a Convention

1. *By claiming an Article V convention is a “convention of the states,” advocates rely upon the logical fallacy of assuming their own argument.*
 - a. While a convention of the states is a well-recognized assembly used throughout our history to negotiate and solve problems arising among the states and within regions of the country, the Founders did not say an Article V convention is a convention of the states. Recent proponents of an Article V convention created that argument.

- b. The Founders created a “convention for proposing amendments” and left the details, processes, and procedures surrounding the operation of such a convention unaddressed.
 - c. Prof. Robert Natelson, one of the leading advocates of an Article V convention, claims that the Founders intended a convention for proposing amendments to be a convention of the states and there was no need to explain it because, “it was too clear to need explanation. Everyone knew that a convention for proposing amendments was a convention of the states.”
 - d. Apparently, no one told James Madison. Madison expressed concern over the vagueness and ambiguity of the term “convention for proposing amendments” when it was first raised at the Philadelphia Convention of 1787 and adhered to those concerns throughout the drafting, debate, and ratification process. There is nothing in the historical record to support Natelson’s claim that “everyone” knew a CPA was a CoS.
 - e. Don’t let advocates assume their own argument.
2. *Advocates also claim a CPA can be limited by topic or scope through the Article V application process.*
- a. CoS Action urges state legislatures to apply to Congress for an Article V convention limited to proposing amendments that would restrain government spending, limiting expanding federal power, and impose term limits on federal officials.
 - b. Article V itself is silent on whether the states in their applications or Congress in its call of a convention could impose such limits. There are arguments on both sides of the question but no definitive answer. And no enforcement mechanism.
 - c. But even advocates acknowledge that a CPA would be a deliberative body that would draft, debate, and decide on the language of any proposed amendment. In that respect, advocates agree that a CPA could not be limited to voting up or down on a proposed amendment drafted prior to the convention and included in a state’s application or the Congressional call.
 - d. Even if we assume that a CPA could be limited in its scope or the subject matter in can address, that should not give state legislatures any confidence that only their preferred policy preferences would be encompassed by a proposed amendment.
 - e. As a deliberative body, like a legislature, a CPA would engage in debate, deal-making, horse-trading, and compromising over the course of its work. We’ve seen the results of such legislative sleight of hand in the passage of the Affordable Care Act (aka Obamacare). A bill passed in the House to provide tax breaks to certain military home buyers was amended to become Obamacare. SCOTUS upheld Obamacare’s individual mandate because it was a tax. Two totally unrelated pieces of legislation fell under the same topic or scope: taxes.
 - f. Obviously, even if a CPA could be limited in scope or restricted to specific topics there is no guarantee that any proposed amendment would conform to supporters’ preferred policy goals.

- g. Assurances that a CPA can be limited to certain topics or subjects are illusory once the horse-trading and deal-making begin. Don't let advocates obscure that reality.
- 3. *Advocates claim that state legislatures can control the operation of a CPA by placing restrictions on delegates, including criminal penalties if they depart from the preferred policy goals.*
 - a. While Article V is silent on how delegates would be chosen, most agree that state legislatures would create the selection process, whether it be a vote by the people or selection by the legislature.
 - b. Trying to control delegates by imposing criminal penalties for a departure from a state legislature's preferred policy is problematic for several reasons.
 - c. First, this argument seems to assume that delegates to a CPA would be a homogenous group of like-minded political thinkers. In today's political and cultural climate, the convention delegates will be an amalgam of political and cultural philosophies that span the current spectrum.
 - d. Second, a CPA is a creature of the Constitution and it performs a federal function in drafting, debating, and proposing amendments, much like Congress would do in drafting, debating, and proposing amendments. State legislatures cannot micromanage their elected representatives in Congress and the Constitution does not say that states can micromanage CPA delegates as they perform their federal function.
 - e. Third, the deliberative function of a CPA makes "control" or management of the process by the state legislatures, especially through a criminal sanction, very problematic. Criminal statutes must give fair notice to a person of what conduct is prohibited. The very nature of a give and take legislative debate over the language of any proposed amendment makes drafting the specificity of that fair notice virtually impossible.
 - f. Fourth, the Philadelphia Convention of 1787 reveals the ineffectiveness of state legislatures trying to control a convention outcome by restricting the authority of delegates. Three states, NY, Connecticut, and Massachusetts, all limited the authority of their delegates to "solely revising the Articles of Confederation." A total of 10 delegates, three from NY, four from Massachusetts, and three from Connecticut arrived in Philadelphia with state-imposed restrictions on their authority. Of the 10, only 3 complied. When 70% of the authority-restricted delegates ignore the restrictions, it reveals how ineffective such long-distance efforts to control the outcome of a convention are.
 - g. State legislators need to be aware that attempts to control delegates to conventions, like the Philadelphia Convention of 1787, did not work out so well and they should not bet the Constitution on being able to do so today.
- 4. *Advocates concede that the Constitution does not provide detailed guidance on a CPA but are confident that federal courts can be relied upon to resolve any disputes that may arise.*
 - a. Prof. Natelson boldly claims that "Article V issues are freely justiciable." In other words, don't worry if there are unanswered questions, the courts will provide

the needed answer. Presumably, he believes the courts will answer those questions in his favor.

- b. Interestingly, the advocates of a CPA claim that federal courts are part of the problem of expanding federal power and need to be reined in just like Congress. Why they would then turn around and express confidence that those same courts would resolve any disputes over the CPA process is another gap in their logic.
 - c. But even if a lawsuit was filed over a CPA issue it is far from certain whether a federal court would have jurisdiction to consider the merits of the case. While some federal courts have reached the merits of some cases brought to determine whether state ratifications or withdrawal of ratifications of amendments were effective and whether Congress could set time limits on the ratification process, no federal court has ever been asked to fill in the blanks concerning a CPA.
 - d. Obviously, we've never had a CPA so there's never been an occasion to invoke federal court jurisdiction. But cases arising in other Article V contexts reveal how the nuances and complexities of federal jurisdiction may make any lawsuit nonjusticiable.
 - e. SCOTUS held in *Coleman v. Miller*, 307 U.S. 433 (1939) that whether Kansas' efforts to ratify a proposed child labor amendment thirteen years after Congress first proposed it was a nonjusticiable political question.
 - f. Lower federal courts have avoided the political question doctrine in some other ratification lawsuits but found the cases nonjusticiable for lack of standing (*Commonwealth v. Ferriero*, 525 F. Supp. 3d 36 (D.D.C. 2021) and for the inability of the plaintiff to allege a direct and redressable injury caused by the conduct of the defendant, in this case the refusal of the National Archivist to certify and publish the ERA as a valid amendment to the Constitution. *Equal Means Equal v. Ferriero*, 3 F. 4th 24 (1st Cir. 2021).
 - g. The authority relied upon by advocates of a CPA for confidently claiming that any disputes over CPA issues are "freely justiciable" is extremely weak. Those making such a claim are either naïve, misunderstand the nuances of federal jurisdiction, or are attempting to obscure the reality of the situation.
5. *Finally, advocates claim a CPA is a benign effort that cannot produce harmful outcomes because it takes 38 states to ratify a proposed amendment.*
- a. The argument itself concedes that a CPA could produce a rogue or radical amendment, despite their assurances that such an amendment could not possibly come out of a CPA.
 - b. The "ratification safeguard" argument also does not consider the time frame from the state application for a CPA to a convention proposing an amendment and the numerous election cycles that would take place over that time frame.
 - c. You only must examine the headlines in the media today to appreciate how quickly things change. Remember when inflation was caused by government spending? Today we're told that more government spending will reduce inflation. Title IX was originally intended to encourage women's participation in

sports, but today we have biological males dominating women's NCAA swimming. It used to be that everyone knew what a woman was, and you didn't need a degree in biology to answer that question.

- d. As Yogi Berra said, "predictions are hard, especially those about the future."
- e. The 38-state ratification bar is a high one, but if we get there it proves all the other arguments made by advocates have failed spectacularly and we're dealing with that difficult to predict future.

Conclusion

James Madison pointed out the ambiguities and vagaries of a convention for proposing amendments when the idea was first raised in Philadelphia in 1787. Nothing transpired during the Philadelphia Convention to allay his concerns. Several months later when asked whether another convention should convene to consider adding a bill of rights to the Constitution, Madison was clearly and unequivocally opposed. Not to a bill of rights, but invoking the convention method of adding a bill of rights to the Constitution.

In his letter to fellow Virginian George Turberville in response to the question whether he would support another convention, Madison specified three objections and are still applicable:

1. Regardless of the merits of any amendments, the convention method is so fraught with unknowns that some states will oppose the process because of the mode.
2. The convention method was a cumbersome and ill-defined process while the congressionally proposed route was much simpler and more likely to produce the desired outcome.
3. The outcome of a convention depended entirely upon the character and quality of the delegates. Madison feared political passion, pet policy preferences acceptable to some but vigorously opposed by others, and the partisanship of the delegates would make it highly unlikely that "the deliberations of the body could be conducted in harmony or terminate in the general good."

All three of Madison's concerns are present today, perhaps even more starkly. James Madison knew conventions far better than any modern legal scholar. I defer to Madison's view and think state legislators should, too.